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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1945.**

**No.**

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In the Matter

of

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY,
A Corporation,

*Petitioner,*

vs.

CITY OF TUCSON, A Municipal Corporation,

*Respondent.*

---

## Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

*To the Honorable, the Supreme Court of the United States:*

The petition of The Tucson Gas, Electric Light and Power Company for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the decision of said court rendered the 26th day of December, 1945, respectfully shows:

### STATEMENT

The decision sought to be reviewed is City of Tucson, a municipal corporation, appellant, vs. The Tucson Gas, Electric Light and Power Company, a corporation, appellee (R. Vol. II, p. 24), which reversed the judgment of

the United States District Court for the District of Arizona dismissing the complaint for condemnation of petitioner's utility properties on the ground that it failed to state a claim upon which relief could be granted. The District Court rendered no opinion, but simply entered its order upon which the judgment of dismissal was entered September 20, 1945 (R. Vol. I, p. 43).

## The Facts

On February 2, 1944, the City of Tucson, a municipal corporation, respondent, filed its complaint to condemn all of petitioner's electric and gas properties, located in said City and environs, and extending into the three adjoining counties of Pinal, Cochise and Santa Cruz, Arizona, in the Superior Court of Pima County, Arizona, under the Arizona Municipal Revenue Bond Act of 1943 (R. Vol. I, p. 2), and thereafter, upon the ground of diversity of citizenship, the action was removed to the United States District Court for the District of Arizona (R. Vol. I, p. 30). A motion to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted was filed by petitioner, with amendments thereto, and after hearing, the District Court dismissed the action (R. Vol I, p. 42).

Appeal was taken to the United States Circuit Court of Appeals for the Ninth Circuit by the City on the general ground that the court erred in granting judgment dismissing plaintiff's complaint.

The complaint alleges (R. Vol. I, pp. 2-20):

The municipal character of respondent; that it is situate in Pima County, Arizona; that petitioner is a Colorado corporation transacting business in Pima County, Arizona, distributing electricity and gas to respondent and its in-

habitants and also to consumers located outside the City; that the utility property of petitioner is located within the City as well as outside thereof, in Pima, Pinal, Cochise and Santa Cruz Counties, all devoted to a public use, and that by virtue of respondent's Charter and the laws of Arizona, particularly sections 27-901 and 27-906, Arizona Code Annotated 1939 (being portions of the Eminent Domain Law of the State), respondent is authorized to condemn such property; that the property sought to be condemned is to be used by respondent in supplying electricity and gas to the City, its inhabitants, and also to consumers located outside the City; that the taking is for a public use and necessary for the operation and maintenance of a municipally owned electric utility and for supplying electricity and gas to the City, and others within the State; that the property is now devoted to a public use, and that the use to which respondent will apply property is a more necessary public use; that respondent proposes to finance the acquisition of said property under the provisions of the Municipal Revenue Bond Act of 1943 (being Sections 16-2601–16-2619 of the Arizona Code Annotated 1939, June 1945 Pocket Supplement, App. pp. 21-29; herein sometimes called "Revenue Bond Act"); that the Mayor and Council of said City have duly passed and adopted a resolution declaring said property necessary to respondent for the use as specified in the complaint, and directing the city attorney to institute an action in condemnation.

The respondent's Charter (Ch. IV, Sec. 1, Par. 25, App. page 21) provides that no public utility shall be acquired by the City without the assent of a majority of the qualified elector taxpayers voting on the question at a general or special election. The complaint contains no allegation that such election has been held. The Revenue Bond Act provides (Sec. 16-2604, App. page 22) that

questions of bond issues under the Act must be submitted to the real property taxpayers of the municipality and that no bonds shall be issued without the assent of the majority of such qualified electors voting at an election held for that purpose. The complaint contains no allegation that such an election to authorize bonds to finance the acquisition by the city has been held.

## Questions Involved

The questions presented in this case are whether the City of Tucson, under the allegations of its complaint, can maintain an action to condemn petitioner's utility properties:

(a) In the absence of a prior election under its Charter, authorizing the acquisition;

(b) In the absence of an election authorizing the issuance of revenue bonds by respondent under the Revenue Bond Act with which to finance the acquisition of petitioner's properties;

(c) Where a substantial portion of the utility properties are located outside the municipality and now devoted to public service, and the acquisition and operation of such properties by the municipality would according to local law reduce all such outside service to private, contractual service in violation of Sec. 17 of Art. 2 of the Arizona Constitution (R. Vol. I, p. 41) prohibiting the taking of private property for private use;

(d) Where the value of the property is to be fixed as of the date of summons in the action, and the petitioner is obliged to make additions and extensions, when required to furnish service to the public, without receiving any consideration therefor;

(e) Where the proposed taking would violate the due process clause of the Constitution of the United States, Sec. 1 of Art. 14 (R. Vol. I, p. 42), and of the Arizona Constitution Sec. 4 of Art. 2 (R. Vol. I, p. 41), in that neither the Revenue Bond Act, upon which the action is founded, nor the law of eminent domain of Arizona, requires any showing of ability to compensate the owner for his property, or requires the property to be taken at all after judgment in favor of the condemner.

## Reasons for Granting Writ

1. The Circuit Court of Appeals has decided two important questions of local law in a way probably in conflict with applicable decisions of the Supreme Court of the State of Arizona in holding:

(a) that the condemnation of petitioner's property was a matter of general and statewide concern as to which the Revenue Bond Act controlled and not the provisions of respondent's charter, which holding is in conflict with applicable Arizona decisions that such proprietary activity of a municipal corporation as the operation of utility property is a matter of local rather than general concern; and

(b) that the Revenue Bond Act sanctioned the condemnation of utility property outside the corporate limits of the City of Tucson, in conflict with the provisions of the Arizona Constitution that private property shall not be taken for a private use, and applicable Arizona decisions holding utility service by a municipality outside of its corporate limits to be a private use.

2. The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable de-

cisions of this Court by failing to grant petitioner the protection of the due process of law provisions of the Federal and Arizona Constitutions and of the just compensation provision of the Arizona Constitution by holding:

(a) That petitioner, under the Revenue Bond Act as construed by the Circuit Court of Appeals, may be subjected to long and expensive litigation in the ascertainment of the value of its property, the title to its property put under a cloud and the property rendered practically unsaleable, without commitment to acquire the property or provision for compensating its owner; and

(b) That the Arizona eminent domain law fixing compensation and damages as of the date of the summons in the condemnation action and preventing any allowance for additions and betterments made thereafter under petitioner's obligation to render public service, affords just compensation to petitioner for the taking of its property.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may issue out of, and under the seal of, this honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this Court, on a day designated for its review and determination, a full and complete transcript of the record and full proceedings in said United States Circuit Court of Appeals had in said proceeding entitled in that court "City of Tucson, A Municipal Corporation, Appellant, vs. The Tucson Gas, Electric Light and Power Company, A Corporation, Appellee, No. 11005"; and that said cause may be reviewed and determined by this Court as provided by law; that the said decision of the said United States Circuit Court of Appeals for the Ninth Circuit herein may be reversed,

and that your petitioner may have such other and further relief as may be just.

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY

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New York 5, New York,

GEORGE R. DARNELL,
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Tucson, Arizona,

Attorneys for Petitioner.

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**Certificate of Counsel.**

We, the undersigned attorneys for the petitioner herein do hereby certify that the foregoing petition is well founded, and not interposed for delay.

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# BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## Opinions Below

No opinion was rendered by the United States District Court for the District of Arizona. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. Vol. II 14) has not as yet been reported.

## Jurisdiction

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Amended (28 U. S. C., Sec. 347). The order of the Circuit Court of Appeals sought to be reviewed was entered on December 26, 1945 (R. Vol. II 24).

## Statement of Facts

Statement of facts and questions presented appears in the petition.

## Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that an election under Chapter IV, Section I, Paragraph 25 of the Charter of the City of Tucson, authorizing the City to acquire the utility properties of petitioner, was not prerequisite to the authority of the City to initiate the condemnation action.

2. In holding that respondent may condemn petitioner's utility properties located outside the municipality of Tucson, and now devoted to public use, and reduce the utility service in such outside territory from public use to private use, in violation of the provision of the Constitution of the State of Arizona that private property shall not be taken for private use.

3. In holding that respondent had the right to institute proceedings to condemn petitioner's utility properties in the absence of an election under the Arizona Municipal Revenue Bond Act, authorizing the issuance of revenue bonds with which to finance the acquisition of the utility properties.

4. In holding that the provision of the Arizona law of eminent domain, fixing the value of petitioner's property as of the date of summons in the action, is valid and not in violation of the just compensation clause of the State Constitution, and not in violation of the due process clauses of the State and Federal Constitutions.

## Argument

### 1. Respondent Had No Authority to Initiate the Condemnation Action in the Absence of an Election Authorizing It So to Do.

The Charter of the City of Tucson provides that no public utility shall be purchased, leased, acquired, sold, or in any manner disposed of, without the assent of a majority of the taxpayers, who must be qualified electors of the City, voting on the question at a general or special election at which such question may be submitted (App. p. 21). The complaint contains no allegation that such

election had been held. The Charter is controlling because the acquisition and operation of a public utility property is a proprietary function of a municipal corporation, and therefore, a local matter.

In the case of *City of Tucson, a body politic and corporate, Appellant,* v. *Tucson Sunshine Climate Club, a Corporation, Appellee,* No. 4792, decided December 21, 1945, but not yet reported, the Arizona Supreme Court held:

"The rule has been announced in *Luhrs* v. *City of Phoenix,* 52 Ariz. 438, 83 Pac. 2d 283, that if an activity is carried on by a municipality as the agent of the state it is of general or public concern, but it is of local concern if exercised by the city in its proprietary capacity:" . . .

> '. . . The courts differ as to what activities of the city are of local interest or concern and therefore free from legislative interference. Some of such activities are so noticeably local or state-wide that they are easily assignable, while in others the line of demarcation is very difficult of discernment, because the activity may be neither predominantly local nor state-wide but may partake of both. Whether it is one or the other in such case depends upon whether the activity is carried on by the municipality as an agent of the state. If it is, it is of general or public concern. If it is exercised by the city in its proprietary capacity, it is a power incidental to home rule. *State* v. *City Council of Helena,* 102 Mont. 27, 55 P. 2d 671 . . .'"

". . . This court, and most courts speaking upon the subject, have held that a home rule city deriving its powers from the constitution, is independent of the state legislature as to all subjects of strictly local municipal concern. *Luhrs* v. *City of Phoenix, supra; Clayton* v.

*State, supra; Consumers Coal Co.* v. *Lincoln,* 109 Neb. 51, 189 N. W. 643; *Axberg et al.* v. *City of Lincoln,* 141 Neb. 55, 2 N. W. 2d 613, 141 A. L. R. 894; 37 Am. Jur. 715-716, Section 106, Municipal Corporations."

The decision of the Circuit Court of Appeals is in conflict with the above holding and the other decisions of the Arizona Supreme Court cited therein, inasmuch as the Circuit Court of Appeals held that the acquisition and operation by the City of Tucson of the petitioner's utility properties was a matter of general and statewide concern, so that the provisions of the Revenue Bond Act controlled, to the exclusion of and in contravention of the provisions of the respondent's charter.

**2. The Circuit Court of Appeals Erred In Holding That Respondent Might Condemn the Private Property of Petitioner Located Outside the Municipality and Convert Its Service From Public Use to Private Use In Violation of the Constitution of Arizona.**

The complaint on its face (R. Vol. I, pp. 3, 16, 18) shows that a substantial part of petitioner's utility properties lies outside the municipality of respondent. It shows (R. Vol. I, p. 16) that petitioner's electric services extend into the three counties of Pinal, Santa Cruz and Cochise, Arizona, in addition to the County of Pima, where Tucson is located, and that such outside properties include a 67 mile, 45,000-volt transmission line extending from Tucson to the City of Nogales, Santa Cruz County, and the distribution and branch lines thereof (R. Vol. I, p. 14); it shows that the petitioner's gas services extend into the County of Pinal; it alleges that petitioner is engaged in supplying electric and gas services to consumers located outside of the City of Tucson (R. Vol. I, p. 3); it alleges that the taking of petitioner's property is necessary in order that the City of Tucson

may supply electricity and natural and artificial gas not only to its inhabitants "but to consumers located outside of said city and within the State of Arizona" (R. Vol. I, p. 18).

Section 17, Article 2 of the State Constitution (App. p. 41) provides that private property shall not be taken for private use, except for certain purposes not here involved.

The Arizona Constitution further provides (App. 42):

> "Whenever an attempt is made to take private property for a use alleged to be public, *the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.*" (Emphasis ours.)

It has been judicially determined in Arizona that utility service municipally operated outside the corporate limits of the municipality is a private and contractual service and not a public service in any sense.

This was squarely held by the Supreme Court of Arizona in *City of Phoenix, et al.* v. *Kasun, et al.* (1939), 54 Arizona 470, 97 Pac. 2d 210.

The City of Phoenix was furnishing water service outside the corporate limits of the municipality and had adopted an ordinance increasing the water rates to be paid by consumers outside the city limits. In a suit to enjoin the enforcement of such higher rates and to review the same the Court held that the service rendered by the city outside of its corporate limits was a purely private contractual service and not a public one and that, therefore, the rate was not subject to review by the courts.

The Court said (97 Pac. 2d 212):

> "A municipality may not compel consumers out-

side of its corporate limits to purchase water from it, nor can it be compelled to furnish such water to non-residents. A municipality can only dispose of its surplus water outside of its corporate limits subject to the prior rights of its inhabitants in case of shortage. We think these propositions are either declared specifically or impliedly by the cases of *City of Phoenix* v. *Wright,* 52 Arix. 227, 80 P. 2d 390; *Crandall* v. *Town of Safford,* 47 Ariz. 402, 56 P. 2d 660; *City of Tucson* v. *Sims,* 39 Ariz. 168, 4 P. 2d 673; *Menderson* v. *City of Phoenix,* 51 Ariz. 280, 76 P. 2d 321."

* * * *

"The distinguishing characteristic of a public utility is the devotion of private property by the owner to such a use that the public generally, or at least that part of the public which has been served and has accepted the service, so long as it is continued, shall be conducted with reasonable efficiency and under proper charges. When private property is thus devoted to the public use, certain reciprocal rights and duties are raised by implication of law as between the utility and the persons whom it serves, and no contract is necessary to give them."

And on page 214 the Court, after reviewing the authorities, stated:

"After a careful consideration of all the authorities, we are of the opinion that the controlling factors in the present case are that the city was under no obligation, as a matter of law, to furnish any service to the plaintiffs; that the relationship between them was purely contractual in its nature, and that such being the case, the reasonableness or unreasonableness of the rates fixed by the contract are not subject to review by the court."

Since, under the Arizona Constitution, the question is one for judicial determination, the decisions of the Arizona courts are necessarily decisive on this question.

In complete disregard of these constitutional provisions the Circuit Court of Appeals held (R. Vol. II, page 21):

> "It is our view *that the legislature must have considered* that Appellee's whole utility is put to a higher use when operated by a municipality, though as to some part of it customers outside the city limits are no longer under the public service laws formerly controlling their service." (Emphasis ours.)

If it be assumed that the Arizona legislature in the Revenue Bond Act in effect declared that the proposed use is a "higher use", the Arizona Constitution has specifically put such a declaration beyond the power of the legislature. The disregard by the Circuit Court of Appeals to the plain language of the Arizona Constitution and its failure to follow the decisions of the Supreme Court of Arizona constitute reversible error of a type which should be corrected by this Court on certiorari.

**3. The Condemnation Action Instituted By Respondent Is Void Because the Arizona Municipal Revenue Bond Act Is Violative of the Arizona Constitutional Provision Providing for Just Compensation, and the Due Process Clauses of Both the State and Federal Constitutions, In That Neither Certainty of Compensation Nor Any Remedy for the Enforcement of Payment for the Property Is Provided For.**

The Revenue Bond Act, as construed by the Circuit Court of Appeals, makes no provision for certainty of compensation to petitioner, after the value of the property has been finally determined by the court. The Revenue Bond Act permits the respondent to attempt

to finance the acquisition of the property for a period of eighteen months (Sec. 16-604, App. p. 40, made a part of the Revenue Bond Act by Sec. 16-2603, App. p. 22) after the final judgment of valuation.

*No election to authorize the issuance of bonds may ever be held, and if one is held, the authorization may be denied by the real property taxpayer electors of the municipality.*

The judgment is not a general obligation against the municipality, by virtue of Section 16-2617 (App. p. 28). Under this procedure, a municipality may cast a cloud upon a private utility property by maintaining litigation in eminent domain for a period of several years, and for eighteen months after the litigation is terminated, thereby preventing the owner from disposing of his property to another, and finally deciding not to take the property, or as the result of a vote against issuing revenue bonds if an election is held, find itself unable to finance the acquisition.

> "Laws failing to provide the property owner with an adequate remedy for the enforcement of the payment of damages are violative of the state and federal constitutions, prohibiting the taking of private property without just compensation."
>
> *Wright* v. *Donaldson,* 144 Tenn. 239, 230 S. W. 605.
>
> "The purposes of the Constitution are to place the citizen in a position to demand and receive compensation; that the enabling statutes shall point out the persons who shall pay the compensation, and at the same time furnish the remedy for the enforcement of that payment. None of these things are done by the eighth section of the act, and it is therefore unconstitutional and void."
>
> *Tuttle* v. *Knox County,* 89 Tenn. 157, 14 S. W. 486.

In *Connecticut River R. Co.* v. *Franklin County,* 127 Mass. 50, at page 55, 34 Am. Rep. 338, the court said:

> "It is sufficient that the statute which authorized the taking of the property should provide for the assessment of the damages in the ordinary manner, and direct that the damages so assessed be paid out of the treasury of the commonwealth, and authorize the Governor to draw his warrant therefor. . . . But in the statute before us there is no pledge of the faith and credit of the commonwealth, no appropriation of the general funds in its treasury, and no authority to the Governor to draw his warrant for the payment of the damages out of such funds. On the contrary, the very terms of the statute preclude the inference of any such pledge, appropriation, or authority, by directing that the land taken for the union passenger station shall be paid for from the earnings of the Troy & Greenfield Railroad and Hoosac Tunnel, and appropriating for the purposes of the act a sum not exceeding $9,000 to be paid out of those earnings. Stat. 1878, Chap. 277, secs. 6, 8. The fact, admitted by the parties, that those earnings will probably be sufficient to meet and extinguish all claims for damages for lands so taken, falls short of satisfying the requirement of the Constitution that the owner of property taken for the use of the public shall have a prompt and certain compensation, without being subject to any risk or unreasonable delay."

**4. The Provision of the Arizona Eminent Domain Law Fixing Compensation and Damages as of the Date of the Summons Violates the Just Compensation Clause of the State Constitution and the Due Process Clauses of the State and Federal Constitutions.**

The Revenue Bond Act provides for the condemnation of utility properties but beyond that simple statement relegates the procedure to be followed in condemnation

to the eminent domain law of Arizona. This provides that damages and value shall be fixed as of the date of issuance of the summons in the action and that no improvements placed upon the property thereafter shall be included in the assessment of damages and compensation. (Sec. 27-916, App. p. 37).

**The owner of a public utility property is, therefore, precluded from being compensated for additions, betterments and extensions required to be made after the date of summons.**

The Circuit Court of Appeals airily dismisses this shocking result with the statement that "The public utility corporation, with its peculiar privileges under the Arizona laws, must take the unfavorable with the favorable when it seeks to act under such laws" (R. Vol. II, 20).

**This law, when applied to the taking of public utility property, violates Section 17, of Article 2 of the State Constitution** (App. p. 41), providing:

> . . . **That no private property shall be taken or damaged for public or private use without just compensation having been first made or paid into the court for the owner.** . . .

**This law is likewise violative of Section 4 of Article 2** of the Arizona Constitution (App. p. 41) and of **Section 1, of Article 14, of the Constitution of the United States** (App. p. 42) as denying to petitioner due process of law.

**In *Passaic Consol.* v. *McCutcheon*, 145 N. J. L. 137, 144 Atl. 571, the court held that a New Jersey eminent domain statute, which provided that damages and compensation were to be fixed as of the date of filing the petition, was unconstitutional in that it deprived the owner of compensation for betterment and improvements made**

during the progress of the litigation. The court said at p. 573:

> "It is not unlikely that two years or more would pass before the final termination of the controversy. In the meantime the water company is under the duty and subject to the orders of the Public Utility Commission to make such extensions, improvements, and betterments as may be required to render adequate service to the communities it serves. To refuse to do so because of the pending proceedings would be no defense to the orders. Failure to provide a method by which the owner can be reimbursed for the extension and betterments it is obliged to make during the pendency of the proceedings is a serious matter, and deprives the water company of just compensation for its property if the statute cannot be so construed as to include such payments."

Failure to compensate for additions and betterments is peculiarly unjust where, as here, the owner must suffer not only the delay involved in a necessarily complicated trial as to the value of the public utility property but also an additional arbitrary period of 18 months during which the condemnor may arrange its financing.

## CONCLUSION

**It is respectfully submitted that a Writ of Certiorari should be granted.**

February 20, 1946.

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## APPENDIX

Chapter IV, Section I, Par. 25, Charter of the City of Tucson "The City shall have power:"

"(25) To lease to persons, firms or corporations for the purpose of maintenance, operation or use, any public utility owned or controlled by the City, and to provide for the leasing of any lands now or hereafter owned by the City, except lands donated, purchased, or used as public parks or playgrounds; provided, that any such leases shall be made only to the highest bidder therefor by ordinance duly adopted, and provided, further, that any and all bids for any such lease may be rejected at the discretion of the legislative body of the City; provided, that no public utility shall be purchased, leased, acquired, sold or in any manner disposed of, without the assent of a majority of the taxpayers, who must be qualified electors of the City, voting on the question at a general or special election at which such question may be submitted."

### ARTICLE 26—Municipal Utility Bonds

(Arizona Code Annotated 1939, June 1945 Pocket Supplement)

"16-2601. Short Title.—This act may be cited as the Municipal Revenue Bond Act of 1943. (Laws 1943, ch. 31, sec. 1, p. 72.)"

"16-2602. Definitions.—In this act, unless the context otherwise requires:

'Municipality' means any incorporated city or town;

'Governing body' means the board, commission, or other body having charge of the financial affairs of a municipality;

'Bond' means any bond issued pursuant to this act;

'Utility undertaking' means any one or combination of the following: electric light or power, water, sewer, gas, garbage, or rubbish plant or system, together with all

parts thereof and appurtenances thereto, including, but not limited to, disposal, treatment, and reduction plants, buildings, incinerators, dams, and reservoirs. (Laws 1943, ch. 31, sec. 2, p. 72.)"

"16-2603. POWERS OF MUNICIPALITIES.—In addition to any powers it may now have a municipality shall have power: 1. subject to the requirements and restrictions of sections 16-604 and 16-605, Arizona Code of 1939 (sections 3 and 4, chapter 77, Session Laws of 1933, regular session), within or without its corporate limits, to construct, improve, reconstruct, extend, operate, maintain, and acquire, by gift, purchase, or the exercise of the right of eminent domain, any utility undertaking or part thereof, and acquire in like manner land, rights in land, or water rights in connection therewith; 2. to issue its bonds to finance the cost thereof, and, 3. to pledge to the punctual payment of the bonds and interest thereon an amount of the revenue of the utility undertaking, including improvements or extensions thereafter constructed or acquired, sufficient to pay the bonds and interest as the same shall become due, and to create and maintain reasonable reserves therefor. The amount pledged may consist of all or any part of such revenue. The governing body of the municipality, in determining the cost of the utility undertaking for which bonds are to be issued, may include all costs and estimated costs of the issuance of the bonds, all engineering, inspection, fiscal, and legal expenses allowed by law, and interest which it is estimated will accrue on money borrowed or which will be borrowed during the construction period and for six (6) months thereafter. (Laws 1943, ch. 31, sec. 3, p. 72.)"

"16-2604. VOTE ON BOND ISSUES.—Questions of bond issues under this act shall be submitted to the real property taxpayers who are in all other respects qualified electors of the municipality. No bonds shall be issued without the assent of a majority of such qualified electors voting at an election held for that purpose, as provided in this act. (Laws 1943, ch. 31, sec. 4, p. 72.)"

"16-2605. ELECTION RESOLUTION.—(a) The governing body shall adopt an election resolution calling an election

upon the question of the issuance of bonds. Such resolution shall state in substance: 1. the maximum amount of bonds to be issued; 2. the purpose for which the bonds are to be issued; 3. the maximum rate of interest which the bonds are to bear; 4. a brief, concise statement (which need not include any detail other than the mere statement of the fact) showing that the bonds will be payable solely from revenues; 5. the date on which the election is to be held; 6. the places where votes may be cast; and, 7. the hours between which polling places will be open.

(b) The election resolution shall be published in full at least once, not less than fifteen (15) days nor more than thirty (30) days prior to the date of the election, in a newspaper published in the county and of general circulation in the municipality; or, if there be no such newspaper, the resolution shall be printed in full and posted in five (5) conspicuous places in the municipality not less than fifteen (15) days nor more than thirty (30) days prior to the date of the election. (Laws 1943, ch. 31, sec. 5, p. 72.)"

"16-2606. REGISTRATION.—The governing body may require the registration of all persons desiring to vote at the election, in which case the election resolution shall state the dates, times and places when and where such persons may register. Registration shall begin not less than ten (10) days, and shall close not less than five (5) days, prior to the date of the election. (Laws 1943, ch. 31, sec. 6, p. 72.)"

"16-2607. Ballots.—At the election the ballot shall contain the phrases 'For the Bonds' and 'Against the Bonds.' To the right of and opposite each of said phrases shall be placed a square, approximately the size of the squares placed opposite the names of candidates on ballots. The voter shall indicate his vote 'For the Bonds' or 'Against the Bonds' by inserting the mark 'X' in the square opposite such phrase. No other question, word, or figure need be printed on any ballot. The ballot need not be any particular size, nor need sample ballots be printed, posted, or distributed. A number of ballots, exceeding by not less

than ten (10) per cent the number of registered voters whose names appear on the precinct register of the precinct, town, or city for which printed, shall be printed for and furnished to each polling place. Voting machines shall not be used at any election held under this act. (Laws 1943, ch. 31, sec. 7, p. 72.)"

"16-2608. CANVASS OF RETURNS.—The governing body shall canvass the returns and determine and declare the result of the election. If it shall appear to the governing body that a majority of the qualified real property taxpayers voting thereon assent to the issuance of the bonds, the governing body shall provide for the issuance of such bonds. The determination of the governing body that a majority of the qualified real property taxpayers voting thereon have assented to the issuance of the bonds shall be conclusive in any suit, action, or proceeding involving the validity of such election or the determination or declaration of the result thereof instituted after the date of the delivery of and payment for such bonds. (Laws 1943, ch. 31, sec. 8, p. 72)".

"16-2609. APPLICATION OF ELECTION LAWS.—Except as otherwise provided in this act, the manner of conducting the registration and election, keeping the poll lists, the returns, declaring the results, and doing all acts relating to such election shall conform to the procedure provided by law for the registration and qualification of electors and the holding of special elections wherein the question of the issuance of the bonds of municipal corporations is submitted to an election. (Laws 1943, ch. 31, sec. 9, p. 72.)"

"16-2610. FORM OF BONDS.—Bonds issued under this act shall be fully negotiable within the meaning and for all purposes of chapter 52, Revised Code of 1939 (secs. 52-101—52-402). They may be in one or more series, may bear such dates, may be payable in such medium of payment, at such places, may carry such registration privileges, shall be executed in such manner, may contain such other terms, covenants and conditions, and be in such form, either coupon or registered, as the governing body may by resolution prescribe. They shall be payable in

equal annual instalments, or they shall be of such maturities that the amount required for the payment of interest and principal becoming due thereon each year will be substantially the same and in either case the final payment shall be due not more than thirty (30) years from the date of issuance, provided that the first instalment may be payable on such date as the governing body shall prescribe, not more than two (2) years from the date of issuance. Any or all of such bonds shall be callable at such times, on such terms and in such manner as the governing body by its resolution shall prescribe. Said bonds shall bear interest not exceeding five (5) per cent per annum, payable semi-annually, at the rate set by the accepted bid and shall be sold at not less than par to the one making the best bid therefor, and the governing body shall call for bids thereon by giving thirty (30) days' notice of such call by publication in a newspaper of general circulation within the county, which notice shall be in such form as shall be prescribed by the governing body. The bids shall be for the entire bond issue unless the governing body by resolution shall allow bidding therefor in parcels of less than the entire issue. Pending the preparation of the definitive bonds, interim receipts or certificates may be issued to the purchasers of said bonds in such form and with such provisions as the governing body may determine. (Laws 1943, ch. 31, sec. 10, p. 72; 1945, ch. 95, sec. 1, p. 241.)"

"16-2611. CHARGES FOR UTILITY UNDERTAKING.—The governing body of the municipality issuing the bonds shall prescribe charges, and shall revise the same whenever necessary, so that any utility undertaking for which the bonds were issued shall always remain self-supporting with revenue sufficient: 1. to pay when due all bonds, and interest thereon, for the payment of which the revenue shall have been pledged, encumbered, or charged; 2. to provide for all expenses of operation, maintenance, expansion and replacement of facilities, and, 3. to provide reasonable reserves for said purposes. Until the payment of all bonds on any such public utility issued hereunder and the expiration of the fiscal year of the municipality in which such bonds are paid in full, neither the receipts

nor expenditures in connection with the operation of such public utility shall be subject to the provisions of chapter 73, Arizona Code of 1939 as amended, nor shall such receipts and expenditures, until such time, be included in any budget covered by said chapter 73, Arizona Code of 1939, as amended, provided, that for the purposes of chapter 73, Arizona Code of 1939, as amended, the actual expenditures of any such public utility other than for bond interest and redemption during the fiscal year of the municipality preceding that in which such bonds were paid in full, shall be deemed to have been included in and to have constituted a part of the budget adopted by such municipality for the fiscal year in which such bonds were so paid. (Laws 1943, ch. 31, sec. 11, p. 72; 1945, ch. 95, sec. 2, p. 242.)"

"16-2612. COVENANTS IN RESOLUTION.—Any resolution pertaining to the issuance of bonds under this act may contain covenants as to: 1. the purpose to which the proceeds of sale of the bonds may be applied and to the use and disposition thereof; 2. the use and disposition of the revenue of the utility undertaking for which the bonds are to be issued; 3. the issuance of other or additional bonds, payable from the revenue of the utility undertaking; 4. the operation and maintenance of the utility undertaking; 5. the insurance to be carried thereon and the use and disposition of insurance moneys; 6. books of account and the inspection and audit thereof, and, 7. the terms and conditions upon which the holders of the bonds, or any proportion of them or any trustee therefor, shall be entitled to the appointment of a receiver, who may enter and take possession of the utility undertaking, operate and maintain the same, prescribe charges, and collect, receive, and apply all revenue thereafter arising therefrom in the same manner as the municipality itself might do. The provisions of this act and any such resolution shall be deemed a contract with the holders of the bonds, and the duties of the municipality and of its governing body and officers under this act and any such resolution shall be enforceable by mandamus or other appropriate action in any court of

competent jurisdiction. (Laws 1943, ch. 31, sec. 12, p. 72.)"

"16-2613. Disposition of Proceeds.—All proceeds received from the sale of the bonds, all fees, rents, tolls, or other charges received by the municipality from any utility undertaking financed by the bonds, and all moneys received from any source in connection therewith shall be paid to the financial officer of the municipality whom the governing body thereof shall designate for such purposes. The financial officer shall not commingle any money received under the terms of this act with any other moneys, but the moneys received under the terms of this act shall be deposited in a separate bank account in the name of the municipality. The governing body may by resolution provide that all deposits of such proceeds, fees, rents, tolls, or other charges, and such moneys received under the terms of this act, shall be secured by obligations of the United States or of this state of a market value equal at all times to the amount of the deposits hereunder, and all banks and trust companies are authorized to give such security for the deposits. (Laws 1943, ch. 31, sec. 13, p. 72.)"

"16-2614. Validity of Bonds.—Bonds issued under this act and bearing the signatures of officers in office on the date of the signing thereof shall be valid and binding obligations, notwithstanding that before the delivery thereof and payment therefor any or all of the persons whose signatures appear thereon shall have ceased to be officers of the municipality issuing the same. The validity of the bonds shall not be dependent on nor affected by the validity or regularity of any proceedings relating to the construction, acquisiton, improvement, reconstruction, or extension of the utility undertaking financed by the bonds or taken in connection therewith. (Laws 1943, ch. 31, sec. 14, p. 72.)"

"16-2615. Certification by Attorney-General.—Any municipality may submit to the attorney-general any bonds to be issued under this act after all proceedings for their issuance have been taken. Upon such submission, it shall be the duty of the attorney-general to ex-

amine into and pass upon the validity of the bonds and the regularity of all proceedings in connection therewith. If such proceedings conform to the provisions of this act, and such bonds when delivered and paid for will constitute binding and legal obligations of the municipality according to the terms thereof, the attorney-general shall certify in substance upon the back of each of said bonds that it is issued in accordance with the constitution and laws of this state. (Laws 1943, ch. 31, sec. 15, p. 72.)"

"16-2616. Prior Lien of Bonds.—All bonds of the same issue under this act shall have a prior and paramount lien on the revenue of the utility undertaking for which the bonds have been issued over and ahead of all bonds of any issue payable from that revenue which may be subsequently authorized, and over and ahead of any claims or other obligations of any nature against that revenue subsequently arising or subsequently incurred. All bonds of the same issue under this act shall be equally and ratably secured, without priority by reason of number, date of bonds, sale, execution, or delivery, by a lien on the revenue in accordance with the terms of the resolution authorizing the bonds. (Laws 1943, ch. 31, sec. 16, p. 72.)"

"16-2617. Bonds Not Debt of Municipality.—No holder of any bonds issued under this act shall have the right to compel any exercise of the taxing power of the municipality to pay said bonds or the interest thereon. Each bond issued under this act shall recite in substance that the payment of said bond and the interest thereon is enforceable exclusively from the revenue pledged to its payment. Bonds issued under this act by any municipality shall not be a debt of the municipality, nor shall payment thereof be enforceable out of any funds other than the revenue pledged to the payment thereof. (Laws 1943, ch. 31, sec. 17, p. 72.)"

"16-2618. Supplemental Nature of Act.—In so far as the provisions of this act are inconsistent with any other provision of law, the provisions of this act shall be controlling. The powers conferred by this act shall be in addition and supplemetal to the powers conferred by any

other law. Except as herein expressly provided, the utility undertaking may be constructed, improved, reconstructed, extended, and acquired, notwithstanding that any other law may provide for the construction, improvement, reconstruction, extension, or acquisition of a like utility undertaking and without regard to the requirements, restrictions, or other provisions contained in any law, including, but not limited to, sections 16-602 and 16-603, Arizona Code of 1939 (sections 1 and 2, chapter 77, Session Laws of 1933, regular session). Bonds may be issued under this act for any utility undertaking, notwithstanding that any other law may provide for the issuance of bonds for a like purpose and without regard to the requirements, restrictions, or other provisions contained in any other law. (Laws 1943, ch. 31, sec. 18, p. 72.)"

"16-2619. BONDS VALIDATED.—All Bonds lawfully issued under the provisions of chapter 4, Session Laws of 1940, first special session, and chapter 107, Session Laws of 1941, regular session, are validated and confirmed. (Laws 1943, ch. 31, sec. 19, p. 72.)"

## ARTICLE 9

### EMINENT DOMAIN

### (Arizona Code Annotated 1939)

"27-901. USES FOR WHICH MAY BE EXERCISED.—Subject to the provisions of this chapter (article), the right of eminent domain may be exercised by the state, a county, city or political subdivision, or by any person, for the following uses:

1. All public uses authorized by the government of the United States;

2. Buildings and grounds for any public use of the state and all other public uses authorized by the legislature;

3. Buildings and grounds for the public use of any county, city, town, or school districts; canals, aqueducts, flumes, ditches, or pipes, for conducting water for the use of the inhabitants or for drainage, of any county, city, village or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys, and all other public uses for the benefit of any county, city, village or town, or the inhabitants thereof, which may be authorized by the legislature; but the mode of apportioning and collecting the costs of such improvements, shall be such as may be provided in the law by which they are authorized;

4. Wharves, docks, piers, chutes, booms, ferries, bridges, toll-roads, by-roads, plank and turnpike roads and highways; steam, horse, electric and cable railroads or railways; telegraph and telephone lines and conduits for public communication; electric light and power transmission lines, pipe lines used for supplying gas to the public, and all transportation and transmission and intercommunication facilities of public service agencies; aviation fields, reservoirs, canals, ditches, flumes, aqueducts, and pipes, for the use of any county, city or village or its inhabitants, or for public transportation, supplying mines and other industrial enterprises and farms, and farm neighborhoods with water for irrigation, domestic, and other needful purposes for generating electricity; draining and reclaiming lands, and for floating logs and lumber on streams not navigable;

5. Roads, tunnels, ditches, flumes, pipes and dumping places for working mines; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines; also an occupancy in common by the owners or possessors of different mines, or any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines;

6. By-roads leading from highways to residences and farms;

7. Private canals, ditches, flumes, aqueducts, and pipes for conducting water from natural water courses or bodies, or from public sources where the lands to be irrigated are not directly reached by such natural water course or public sources;

8. Pipe lines to carry petroleum, or any other liquid;

9. Rights-of-way, station grounds; pits, yards, side-tracks, and other necessary uses for steam and electric railways. (R. S. 1901, sec. 2445; Laws 1907, ch. 91, sec. 1, p. 168; 1912 (S. S.), ch. 73, sec. 1, p. 225; R. S. 1913, sec. 3072; rev., R. C. 1928, sec. 1329.)"

"27-902. Widening and Extension of Lateral Ditches.—Any person owning an interest in common with another person in any lateral ditch constructed and used for irrigating, mining, milling or other useful and lawful purpose, may widen, deepen, border up, or extend said lateral ditch by paying to his associates, and to the owner of the land through which said lateral ditch passes, a just compensation for any damages to the land, growing crop or crops, occasioned by widening, deepening, bordering up or extending said lateral ditch. A 'lateral ditch,' as referred to herein, is a private ditch leading out of a main ditch or any of its branches receiving water from a river or original source of supply. (R. S. 1901, secs. 2446, 2447; 1913, secs. 3073, 3074; cons. & rev., R. C. 1928, sec. 1330.)"

"27-903. Opening Fences.—It shall be lawful to open any fence in order to repair any public water ditch whenever it is necessary to use a team or vehicle in repair of same without consent of the owner of said fence; provided, however, that the said fence shall, on completion of the repair of said water ditch, be properly enclosed by the party so opening, and in a manner as nearly as possible as it was before opening, and that the party so opening said fence shall be liable for all damages that may occur by reason of said opening and entry. (R. S. 1901, sec. 2448; 1913, sec. 3075; rev., R. C. 1928, sec. 1331.)"

"27-904. PRIVATE WAY OF NECESSITY MAY BE CONDEMNED—DEFINED.—An owner or one entitled to the beneficial use of land, mines or mining claims and structures thereon, which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity over, across, through, and on said premises, may condemn and take lands of such other, sufficient in area for the construction and maintenance of such private way of necessity. The term 'private way of necessity' as used herein shall mean a right-of-way on, over, across, or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, over-head transmission lines, pole lines, power lines, canals, ditches, flumes, pipe lines, drains and tramways for mining, milling, lumbering, agricultural, domestic or sanitary purposes. (Laws 1919, ch. 139, secs. 1, 2, p. 219; cons., R. C. 1928, sec. 1332; Laws 1929, ch. 25, sec. 1, p. 59.)"

"27-905. ESTATES SUBJECT TO CONDEMNATION.—The interests, estates and rights in lands subject to be taken for public use, are: A fee simple, when taken for public buildings or grounds or for permanent buildings, for use in connection with a right-of-way, or for an outlet for the flow or a place for the deposit of tailings from a mine or for irrigating ditches; an easement, when taken for any other use; a right of entry upon and occupation of lands, and the right to take therefrom such earth, gravel, stone, trees, and timber as are necessary for some public use; and use in the water of any stream, river or spring. (R. S. 1901, sec. 2449; 1913, sec. 3076; R. C. 1928, sec. 1333.)"

"27-906. PRIVATE PROPERTY THAT MAY BE CONDEMNED.—Private property which may be taken includes:

1. All real property belonging to any person, including any and all water and water rights for the irrigation of any land so condemned, belonging to or used in connection with such land for the irrigation thereof, with rights-of-way for the water or water rights so condemned through irrigating canals and ditches leading to such land;

2. Lands belonging to this state, or to any county, city, village or town, not appropriated to some public use;

3. Property appropriated to public use;

4. Franchises for toll roads, toll bridges, and ferries, and all other franchises; but such franchises shall not be taken unless for free highways, railroads, or other more necessary public use;

5. All rights-of-way through canyons, passes or defiles and all rights-of-way for any and all the purposes mentioned in subdivision 2, section 1329 (sec. 27-901), and any and all structures and improvements thereon, and the lands held or used in connection therewith, intersected by any other right-of-way or improvements or structures thereon. They shall also be subject to a limited use in common with the owner thereof, when necessary; but such uses, crossings, intersections, and connections shall be made in the manner most compatible with the greatest public benefit and least private injury;

6. All classes of private property not enumerated, including property for use in water or water rights, may be taken for public use, when such taking is authorized by law. (R. S. 1901, sec. 2450; Laws 1907, ch. 91, sec. 2, p. 168; R. S. 1913, sec. 3077; rev. R. C. 1928, sec. 1334.)"

"27-907. Uses for Which May Be Taken.—Before property can be taken, it must appear that the use to which it is to be applied is a use authorized by law; that the taking is necessary to such use; and, if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use. (R. S. 1901, sec. 2451; 1913, sec. 3078; R. C. 1928, sec. 1335.)"

"27-908. Entry and Survey of Property.—Where land is required for public use, the state, or its agents in charge of such use, may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury.

The land may be entered to make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land, except for injuries resulting from negligence, wantonness or malice. Any person seeking to acquire property for any of the uses authorized is an agent of the state, within the meaning of the term. (R. S. 1901, sec. 2452; 1913, sec. 3079; rev., R. C. 1928, sec. 1336.)"

"27-909. Action for Condemnation—Immediate Possession—Money Deposit.—All proceedings for condemnation must be brought in the superior court of the county in which the property is situated, in the same manner as other civil actions. The plaintiff may, at the time of filing his complaint, or any time thereafter, make application to the court for an order permitting him to take possession of, and use the property sought to be condemned for the purpose as prayed for. Upon the filing of such application, a time for the hearing thereof shall be fixed, and notice thereof served upon the parties in interest by personal service within the state, or by publication if without the state, in such manner as the court may direct. On the day of such hearing, if it appear that the use for which the property is sought to be condemned is a necessary use, the court shall receive evidence as to the probable damages to each owner, possessor or person having an interest in each parcel of land sought to be condemned; and may direct that, upon a deposit of money in double the amount of the probable damages so found to each person in interest, the plaintiff shall be let into the possession and full use of the parcels of land as described in such order, for the purposes herein specified. Moneys so paid shall be deposited with the clerk of the court, and be by him held to the use and benefit of each person having an interest in each parcel of land sought to be condemned, subject to final judgment upon the trial of the action, and also as a fund to pay any further damages and costs recovered in said proceedings, as well as all damages sustained by the defendant if for any cause the property be not finally taken for public use. The deposit of said money shall not discharge the plaintiff from liability to maintain said fund in full, but it shall remain as to all accidents, defalcations or other contingencies, as

between the parties to the proceedings, deposited at the risk of the plaintiff until the compensation or damage is finally settled by judicial determination, and the court awards such part thereof as shall be determined upon, to the defendant, or until the clerk is ordered by the court to disburse it. The clerk of the court shall be liable to the plaintiff for such deposit, if lost or abstracted. The court may order the money deposited in the state treasury, and the treasurer shall receive such money, receipt for and safely keep the same in a special fund, to be entered on his books as a condemnation fund, and for such duty he shall be liable to plaintiff. The state treasurer shall pay out such money so deposited as the court may direct. The parties may stipulate as to the amount of deposit, or for a bond from the plaintiff in lieu of a deposit. Such stipulation, or evidence of such deposit, shall not be introduced in evidence, or used to the prejudice of any party in interest on the trial of said action. (R. S. 1901, sec. 2453; Laws 1909, ch. 8, sec. 1, p. 9; R. S. 1913, sec. 3080; rev., R. C. 1928, sec. 1337.)"

"27-910. COMPLAINT—Contents.—The complaint must contain: The name of the person in charge of the public use for which the property is sought, or plaintiff; the names of all owners and claimants of the property, if known, or a statement that they are unknown, as defendants; a statement of the right of the plaintiff; if a right-of-way for any road, ditch, canal or other purpose be sought, the location and general route, accompanied with a map thereof; and a description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire parcel or tract. (R. S. 1901, sec. 2454; 1913, sec. 3082; rev., R. C. 1928, sec. 1338.)"

"27-911. JOINT OR SEPARATE ACTIONS—CONSOLIDATION.—All parcels lying in the county, and required for the same public use, may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to the convenience of parties. When application for the condemnation of a right-of-way for the purpose of sewerage, or to obtain water,

is made on behalf of a settlement or of an incorporated or unincorporated village or town, the board of supervisors of the county may be named as plaintiffs. (R. S. 1901, sec. 2455; 1913, sec. 3083; R. C. 1928, sec. 1339.)

"27-912. SUMMONS.—The clerk must issue a summons, containing the names of the parties, a general description of the whole property, a statement of the public use for which it is sought, a reference to the complaint for descriptions of the respective parcels, and a notice to the defendants to appear and show cause why the property described should not be condemned as prayed for in the complaint. In all other particulars it must be in the form of a summons in civil actions, and must be served in like manner. (R. S. 1901, sec. 2456; 1913, sec. 3084; R. C. 1928, sec. 1340.)"

"27-913. PERSON IN INTEREST MAY DEFEND.—All persons in occupation of, or having or claiming an interest in any of the property described in the complaint, or in the damages for the taking thereof, though not named, may appear, plead and defend each in respect to his own property or interest, or that claimed by him, as if named in the complaint. (R. S. 1901, sec. 2457; 1913, sec. 3085; R. C. 1928, sec. 1341.)"

"27-914. POWERS OF COURT.—The court may regulate and determine the place and manner of making connection and crossings or of enjoying the common use mentioned in the fifth subdivision of section 1329 (sec. 27-901); hear and determine all adverse or conflicting claims to the property sought to be condemned and to the damages therefor; and determine the respective rights of different parties seeking condemnation of the same property. (R. S. 1901, Sec. 2458; 1913, sec. 3086; R. C. 1928, sec. 1342.)"

"27-915. VALUE, DAMAGES, AND BENEFITS TO BE FOUND.—The Court or jury shall ascertain and assess:

1. The value of the property sought to be condemned and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein;

if it consist of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed;

2. If the property sought to be condemned constitute only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff;

3. Separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit be equal to the damages assessed, under subdivision two of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value;

4. If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle guards where fences may cross the line of such railroad. As far as practicable, compensation must be assessed for each source of damage separately. (R. S. 1901, sec. 2459; 1913, sec. 3087; rev., R. C. 1928, sec. 1343.)"

"27-916. Damages and Value Fixed from Date of Summons.—For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the summons, and its actual value at that date shall be the measure of compensation and damages. If an order be made letting the plaintiff into possession prior to final judgment, the compensation and damages awarded shall draw legal interest from the date of such order. No improvements placed upon the property subsequent to the date of service of summons shall be included in the assessment of compensation or dam-

ages. (R. S. 1901, sec. 2460; 1913, sec. 3088; rev., R. C. 1928, sec. 1344.)"

"27-917. PAYMENT OF DAMAGES—FENCES AND CATTLE GUARDS.—The plaintiff must, within thirty (30) days after final judgment, pay the sum assessed; but may, before payment, elect to build fences and cattle guards. If the plaintiff so elect, he shall execute to the defendant a bond, with sureties to be approved by the court, in double the assessed cost of the same, to build such fences and cattle guards within eighteen (18) months from the time the railroad is built on the land taken, and if such bond be given, need not pay the cost of such fences and cattle guards to defendant. In an action on such bond reasonable attorney's fees, in addition to all damages, may be recovered. (R. S. 1901, sec. 2462; 1913, sec. 3090; R. C. 1928, sec. 1345.)"

"27-918. EXECUTION—VACATING DECREE FOR NONPAYMENT.—Payment may be made to defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil actions; and if the money can not be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff. (R. S. 1901, sec. 2463; 1913, sec. 3091; R. C. 1928, sec. 1346.)"

"27-919. FINAL ORDER AFTER PAYMENT.—When the final judgment has been satisfied, the court must make a final order of condemnation, describing the property condemned and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described shall vest in the plaintiff for the purposes therein specified. (R. S. 1901, sec. 2464; 1913, sec. 3092; rev., R. C. 1928, sec. 1347.)

"27-920. POSSESSION—PENDING APPEAL OR AFTER PAYMENT OF JUDGMENT—DISPOSITION OF MONEY PAID INTO

COURT—COSTS OF SECOND TRIAL.—At any time after judgment is entered, or pending an appeal from the judgment to the Supreme Court, whenever the plaintiff has paid into court, for the defendant, the full amount of the judgment, and such further sum as required by the court as a fund to pay further damages and costs that may be recovered in said proceedings, as well as all damages that may be sustained by the defendant, if for any cause the property shall not be finally taken for public use, the superior court in which the proceeding was tried, may upon notice of not less than ten (10) days, authorize the plaintiff, if already in possession, to continue therein, and if not, then to take possession of and use the property until the final conclusion of the litigation, and may, if necessary stay all actions and proceedings against the plaintiff on account thereof. The defendant who is entitled to the money paid into court for him upon any judgment may demand and receive the same at any time thereafter upon an order of the court. The court shall, upon application, order the money so paid into court for him delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding except as to the amount of damages that he may be entitled to in the event that a new trial shall be granted, and such payment shall be deemed an abandonment of all defenses, except his claim for greater compensation. The money paid into court on final judgment may be placed by order of court in the custody of the clerk or state treasurer, to be held or disbursed upon order of court, and the plaintiff and said officers shall be subject to the same responsibility, liabilities and restrictions with respect thereto as heretofore provided in the case of money paid into court by plaintiff upon application for possession before trial. Where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him. (R. S. 1901, sec. 2465; 1913, sec. 3095; rev., R. C. 1928, sec. 1348.)

"27-921. COSTS.—Costs may be allowed or not, and, if

allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court; provided, that in any action for the condemnation of property by or on behalf of any educational, reformatory, or penal institution of the state, if the board or officers having charge of such institution, shall, prior to the commencement of such action or proceeding, tender to the owner of the property, such sum of money as such board or officers deem the reasonable value thereof, and such owner refuses to accept the same and transfer the property, then all costs and expenses of such action or proceeding shall be taxed against such owner, unless the sum of money assessed in the judgment as the value of such property and compensation to be paid therefor is greater than the amount so tendered. (R. S. 1901, sec. 2466; Laws 1907, ch. 91, sec. 3, p. 168; R. S. 1913, sec. 3094; rev., R. C. 1928, sec. 1349.)"

ARIZONA CODE ANNOTATED 1939

"16-604. PUBLIC UTILITIES UNDER EXISTING FRANCHISE—PURCHASE BY MUNICIPALITY.—Where a municipal corporation and the citizens thereof are being served under an existing franchise by any public utility, such municipal corporation, before constructing, purchasing, acquiring or leasing, in whole or in part, any plant or property devoted to the business of or services rendered by such public utility, shall first purchase and take over the property and plant of such public utility. The said property and plant shall become the property of the municipal corporation in the event of and upon the payment by the municipal corporation of the fair valuation thereof, within eighteen (18) months after the determination of such valuation in the manner hereinafter provided. The fair valuation of such public utility shall be the equivalent of the compensation to be paid for the taking of private property for public use under the provisions of chapter 23, Revised Code of 1928 (Secs. 27-901–27-921), and such amount shall be determined by one of the following methods:

1. By agreement between the municipal corporation and the public utility;

2. By arbitrators to be chosen in such manner as may be agreed upon at the time by the municipal corporation and the public utility; or,

3. By a court of competent jurisdiction, sitting to ascertain the compensation for the taking of private property for public use under the provisions of chapter 23, Revised Code of 1928 (Secs. 27-901–27-921).

Both the municipal corporation and the public utility shall have full rights of appeal, as provided by said chapter 23 (Secs. 27-901–27-921). (Laws 1933, ch. 77, Sec. 3, p. 313.)

CONSTITUTION, STATE OF ARIZONA

(Section 4, Art. 2)

"Section 4—(RIGHT TO LIFE, LIBERTY, PROPERTY)—No person shall be deprived of life, liberty, or property without due process of law".

CONSTITUTION, STATE OF ARIZONA

(A. C. A. 1939, page 73)

(Sec. 17 of Art. 2)

"Section 17. (EMINENT DOMAIN.)—Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches, on or across the lands of others for mining, agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made, or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed

by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public."

CONSTITUTION OF THE UNITED STATES

(Section 1 of Article 14)

"CITIZENSHIP—DUE PROCESS OF LAW—EQUAL PROTECTION.—All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

23

MAR 22 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945

No. 875

In the Matter

of

THE TUCSON GAS, ELECTRIC LIGHT AND POWER COMPANY, A Corporation,

*Petitioner,*

vs.

CITY OF TUCSON, A Municipal Corporation,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT**

## BRIEF OF THE RESPONDENT

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March 17, 1946

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**ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT**

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# BRIEF OF THE RESPONDENT

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## OPINIONS BELOW

No opinion was rendered by the United States District Court for the District of Arizona. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. Vol. II, p. 14) has not as yet been reported.

## JURISDICTION

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Amended (28 U. S. Sec. 347). The order of the Circuit Court of Appeals sought to be reviewed was entered on December 26, 1945 (R. Vol. II, p. 24).

## STATEMENT OF FACTS

Respondent appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment of the United States District Court for the District of Arizona dismissing its complaint in a condemnation proceeding. The complaint was dismissed on motion of the Petitioner on the ground that the complaint failed to state a claim upon which relief could be granted. (R. Vol. I, p. 43).

The complaint seeks a judgment of valuation of all the electric and gas plants and systems of the Petitioner, for the purpose of procuring a final order of condemnation vesting title of the property in the Respondent after revenue bonds for their acquisition have been issued and disposed of and the amount awarded is paid. (R. Vol. I, pp. 2-20).

The Circuit Court reversed the judgment of the District Court and the Petitioner now seeks a Writ of Certiorari to the Circuit Court. (R. Vol. II, p. 24; Petition pp. 1-7).

## SUMMARY OF ARGUMENT

The petition for Writ of Certiorari, being based upon the ground that the decree of the Circuit Court of Appeals herein, is in conflict with applicable decisions of the Supreme Court of Arizona and the Supreme Court of the United States, should be denied in the absence of any showing of such conflict by Petitioner.

## ARGUMENT

It should be noted that the Municipal Revenue Bond Act of 1943 is not a limitation nor a restriction upon the exercise of any power existing in a municipality, whether such power exists by virtue of the Constitution of Arizona, the general laws of the State, or the City Charter. It is a grant of additional power. A grant in addition to any power the municipalities may now have, by virtue of the Constitution of Arizona, any other laws of the State of Arizona, and the City Charter. (Petition and Brief of Petitioner, App. p. 22).

To hold that because a power now exists in a municipality by virtue of its Charter, the State cannot in addition thereto give or grant the same power to be exercised in another manner, is untenable and is and would be in conflict with the decisions of the Supreme Court of Arizona, for as said by that Court:

> "It is not a novelty in the law to find the same act punishable by statute and by City Ordinance. Indeed, it is quite common for the two jurisdictions to legislate concurrently on the same subject. Where the subject is one of local interest or concern, or where though not of local interest or concern the

> charter or legislation confers on the city express power to legislate thereon, both jurisdictions may legislate on the same subject."

*Clayton* v. *State,* 300 Pac. 1010; 38 Ariz. 466 at 468.

to the same effect see

*State* v. *Jaastad,* 32 Pac. (2d) 799; 43 Ariz. 458 at 463.

*Humphrey* v. *City of Phoenix,* 102 Pac. (2d) 82; 55 Ariz. 374 at 388.

It is therefore apparent that the decree of the Circuit Court of Appeals holding that the Respondent could proceed under the Municipal Revenue Bond Act of 1943 to acquire the properties of the Petitioner, is not in conflict with the decisions of the Supreme Court of Arizona.

It is next contended by Petitioner that the decree of the Circuit Court of Appeals violates the Constitution of Arizona providing that private property shall not be taken for private use, except for certain purposes not here involved.

(Petitioner's Br. p. 13)

This contention is also untenable for as stated by the Court in *City of Pasadena* v. *Railroad Com.,* 183 Cal. 526, 192 Pac. 25

> "It is not true that a City is a private corporation when carrying on a municipally owned public utility. No decision so holds. All the decisions on the subject recognize the fact that a City does not change its character by engaging in such enterprises."

The foregoing was quoted with approval by the Arizona Supreme Court in *Menderson* v. *City of Phoenix,* 51 Ariz. 280 at 289; 76 Pac. (2d) 321. See also *City of Phoenix v. Wright,* 52 Ariz. 227 at 233, points 3 and 4; 80 Pac. (2d) 390 at 392, 393, points 3 and 4.

It naturally follows, therefore, that a proprietary use is as much a public use as is a governmental function a public use. It is impossible for a municipal corporation to exercise a private use of anything. It may engage in an enterprise that is in the nature of a private enterprise but in so doing it is nevertheless a public corporation operating as such for the public of which it is comprised.

It is submitted that Petitioner has again failed to maintain its position that the decree of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of Arizona for the reason that none of the decisions cited hold that a City, when carrying on a municipally owned public utility, is not a public corporation operating as such for the public of which it is comprised.

In support of its contention that the petition for Writ of Certiorari should be granted for the reason that the decree of the Circuit Court of Appeals is in conflict with applicable decisions of this Court, petitioner contends that neither certainty of compensation nor any remedy for the enforcement of payment for the property is provided for. (Petitioner's Br., p. 15).

In each of the cases cited by Petitioner in support of such contention the statutes provided for the taking of the property but failed to provide a remedy for the enforcement of the payment and designating the persons who should pay. (Petitioner's Br., pp. 16, 17).

That is not the situation here for the reason that, as said by the Circuit Court of Appeals in its opinion (R. Vol. II, pp. 14-23 at 14-15)

> "Though the judgment assessing the value of the properties to be acquired is called a final judgment, condemnation—that is the vesting of title—is not made until the assessed amount it paid. Failure to pay the amount within the statutory time requires that the interlocutory order for condemnation be set aside and the entire proceedings annulled with a right of execution in the defendant. Id. Sec. 27-918. For properties to be paid for by revenue bonds, the time after judgment fixing the price within which the payment is made is eighteen months. Arizona Laws, 1933, Ch. 77, Sec. 3, p. 313."

From the foregoing the conclusion is inevitable that under the Municipal Revenue Bond Act of 1943, there can be no taking without just compensation being first paid the Petitioner and that therefore the decree of the Circuit Court of Appeals is not in conflict with any applicable decision of this Court.

The final contention of Petitioner is that because the damages and value are to be fixed as of the date of the issuance of the summons in the action and that no improvements placed upon the property thereafter shall be included in the assessment of damages and compensation the just compensation clause of the State Constitution and the due process clauses of the State and Federal Constitutions are violated. (Petitioner's Br. p. 17).

This contention is also untenable for many Courts have affirmed the fixing of the valuation as of the date of the summons and the precluding of compensation for additions, betterments and extensions put upon the property subsequent to the date of the service of summons.

*Wiser Valley Land and Water Co.* v. *Ryan,* 190 Fed. 417.

*Brown* v. *United States,* 263 U. S. 78; 44 Sup. Ct. 92 at 94, point 3; 68 L. Ed. 171.

*Central Nebraska Public P. & Ir. Dist.* v. *Fairchild,* 126 F (2d) 302.

*City of Los Angeles* v. *Goger,* 10 Cal. A. 378; 102 Pac. 17.

*City of Oakland* v. *Wheeler,* 34 Cal. A. 442; 168 Pac. 23.

*Municipal Water Dist.* v. *Marine Water and Power Co.* et al, 178 Cal. 308; 173 Pac. 469.

It may be that a public utility being operated for private profit should not be subject to any business hazards such as the right of a municipality to institute condemnation proceedings for the acquisition of its properties, but it is submitted that the right of condemnation is and has always been a perogative of the state and that in the instant case an exercise of that perogative with a requirment of just compensation being first made in the event of a taking is not a denial of due process but merely a hazard to be considered when private enterprize engages in business as a public utility.

## CONCLUSION

The petitioner having failed to establish wherein the decree of the Circuit Court of Appeals reversing the judgment of the District Court dismissing the complaint for failure to state a claim upon which relief could be granted, is in conflict with any applicable decision of this Court, the Supreme Court of Arizona, or the United States or Arizona Constitutions, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

March 17, 1946.

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